92-1904

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN O. GUILLORY,
Petitioner,
v.
THE PORT OF HOUSTON AUTHORITY,
Respondent.

Petition For Writ Of Certiorari To
The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment permits a State to grant immunity to one class of governmental units while giving no immunity to other governmental units that perform identical functions?

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NO._____

IN THE

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OCTOBER TERM, 1992

JOHN O. GUILLORY,
Petitioner,

v.

THE PORT OF HOUSTON AUTHORITY,
Respondent.

Petition For Writ Of Certiorari to The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Texas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 845 S.W.2d 812 and reprinted in the Appendix at App. 1a. The opinion of the Texas Court of Appeals is reported at 814 S.W.2d 119 and reprinted in the Appendix at App. 15a.

JURISDICTION

The Texas Supreme Court entered judgment on Jan. 20, 1993, and it denied a timely motion for rehearing on

March 3, 1993. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This is an Equal Protection challenge to the piecemeal extension of immunity to certain governmental entities, pursuant to a statutory scheme. The relevant parts of the statutory scheme are reproduced in the Appendix at 26a.

The Equal Protection Clause is found in U.S. CONST. amend. XIV, § 1, which provides in part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The question in this case is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, a state may selectively give immunity to some governmental units yet not to other units that perform identical functions. The facts that underlie this question are simple.

1. On June 9, 1984, Petitioner John O. Guillory was seriously injured while driving a truck rented from Respondent, The Port of Houston Authority. Petitioner was working as a longshoreman in maritime commerce; Respondent was running a profit-making rent-a-truck business. Petitioner sued Respondent on three theories: (a) common law negligence and gross negligence, (b) the Longshore Harbor and Workers' Compensation Act, 33 U.S.C. § 901 et seq., and (c) federal maritime law. At least 30 prior

accidents had resulted from Respondent's trucks. *See* App. at 9a. The jury found Respondent negligent and grossly negligent. It assessed actual and punitive damages. After adding prejudgment interest, the trial court entered judgment against Respondent for $ 956,781.91.

2. The Texas Court of Appeals reformed the judgment by limiting Respondent's liability to $ 100,000. It based its decision on the state's sovereign immunity scheme. Under that scheme, some governmental units are immune from liability while some are not. Specifically, the Texas Tort Claims Act bars recovery of more than $ 100,000 from a political subdivision of the state in injury cases arising from the "use of motor-driven a vehicle." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A) (Vernon 1986); App. at 28a. The Court argued that Respondent is technically owned by a navigation district, which is "like a county," which in turn is treated like the state and therefore enjoys immunity. App. at 17a.

3. A divided Texas Supreme Court affirmed. It based its decision on Respondent's technical status. It conceded that the result would have been different had the port been owned by a *city* instead of a navigation district. Had Petitioner's accident taken place at the port next door -- the Port of Galveston, which is owned by a city -- the outcome would have been different. When Petitioner suggested making immunity turn on the nature of the activity rather than the juridical origin of the entity, the Court rejected that invitation on the basis of precedent. App. at 6a. Why political pedigree was thought to support a distinction between otherwise identical ports was not explained by the majority. To the dissenters it was unexplainable:

> The majority does not and cannot explain what purpose of the Tort Claims Act is poten-

> tially served by differentiating between the proprietary functions of municipalities and those of navigation districts, or how that distinction rationally relates to this undisclosed purpose.

App. at 11a.

STATEMENT OF PRESERVATION

The federal question presented here has been properly preserved. First, Petitioner timely urged it to the court of appeals in a motion for rehearing, where the unconstitutional statutes were first applied to his case; the court summarily denied rehearing without opinion. Second, he presented the question in his brief to the Texas Supreme Court; that Court explicitly passed on it in its opinion. App. at 6a. Finally, he timely reurged it to the Texas Supreme Court in a motion for rehearing, which was summarily denied without opinion. App. at 25a.

REASONS FOR GRANTING THE WRIT

This petition raises an important and recurring issue on which there is a square conflict among lower courts. That issue is whether the Equal Protection Clause permits dispensation of immunity to one governmental unit yet not to another, where the two entities are indistinguishable in all respects except juridical origin. May unit X validly claim immunity when its otherwise identical neighbors, units Y and Z, enjoy none? Without a grant of certiorari here, the question cannot be answered.

A. The Lower Courts Require Guidance

This question normally arises in state courts. Granting review is the only way to give guidance to those tribunals on interpretation of the Equal Protection Clause. There is a patchwork quilt of holdings by state supreme courts. Further, every lower state court is duty bound to follow the federal holdings of its state high court; these courts also require guidance.

1. The conflict is genuine.

The courts have taken opposing views on the validity of arbitrary distinctions between governmental units.

a. Violations found

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), the court confronted a law that granted immunity only to "the largest city in the largest county in the state." 354 So.2d at 810. It struck it down:

> Such a classification, moreover, arbitrarily denies to citizens the right to pursue against that city remedies for injuries to person and property resulting from the exercise of its governmental functions, while they are free to pursue those same remedies against all others, as we shall show later. This results in a denial of equal protection of the laws, United States Constitution, Article Fourteen, because it constitutes an irrational difference in the treatment of our citizens, *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); *accord, Comer v. City of Mobile*, 337 So.2d 742 (Ala. 1976).

Id.

Chandler v. Hospital Auth. of Huntsville, 500 So.2d 1012 (Ala. 1986) considered a law that granted immunity only to hospitals created by a particular part of a statute but not to identical hospitals created by another part of the act. The court again struck down the classification as irrational:

> That is, does [the act] create an impermissible classification as between patients injured in hospitals organized under Article 5? We find that [the act], by its very terms, and in comparison with the provisions of Articles 3, 4, 6, and 11, does create a classification which affords unequal protection to patients injured in an Article 5 hospital by depriving them of a remedy in tort for such injuries.
>
> . . . . Indeed, whether or not prospective patients know a hospital was organized under Article 3 or 4 or 5 or 6 or 11, and whether or not, if tortiously injured while in such a public hospital, they will have a remedy for their injuries, it is most probable that they will simply choose the hospital facility closest to their residences.

500 So.2d at 1016-17. *See also Gaines v. Huntsville-Madison Cty. Airport Auth.*, 581 So.2d 444 (Ala. 1991)(Equal Protection violation to classify airports by local population).

Ryszkiewicz v. City of New Britain, 193 Conn. 589, 479 A.2d 793 (1984) invalidated a state law that put damage caps on any slip-and-fall case occurring in the city of New Britain: "There has been no showing of any financial,

climatic, topographic, demographic, or other circumstances peculiar to the city of New Britain that rationally warrant discriminatory treatment of those injured by defects related to snow or ice on its sidewalks." 479 A.2d at 800 (footnote omitted). The law denied Equal Protection: "there is no rational basis behind imposing a liability limit of $ 1000 in damages for all such torts that happen to occur in New Britain." *Id.* at 801.

Other supreme courts take the same view. *See Flax v. Kansas Turnpike Auth.*, 226 Kan. 1, 596 P.2d 446, 453-54 (1979)(Equal Protection violation where law granted immunity for accidents occurring on the Kansas Turnpike but not on any other roads); *Jenkins v. State of Washington*, 85 Wash.2d 883, 540 P.2d 1363, 1366-67 (1975)(Equal Protection violation where counties were given different treatment from other units of government).[1]

b. No violations found

Naturally, some state supreme courts have reached a contrary conclusion. *E.g.*, *Colorado v. DeFoor*, 824 P.2d

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[1] Several supreme courts hold that Equal Protection forbids requiring notice of suit against the government in an artificially short time. *Miller v. Boone Cty. Hosp.*, 394 N.W.2d 776 (Iowa 1986)(law required notice within 60 days of injury); *Reich v. State Highway Dep't*, 386 Mich. 194 N.W.2d 700 (1972)(same); *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977)(30 days); *Lepon v. Tiano*, 181 W. Va. 185, 381 S.E.2d 384 (1989)(30 days).

Without citing the conflicting cases dealing with medical malpractice and "tort reform" acts, it suffices to say that many courts take rationality seriously. *See Bernthal v. City of St. Paul*, 376 N.W.2d 422 (Minn. 1985)(Equal Protection violated by law immunizing cities if the plaintiff has workers compensation); *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984)(Equal Protection violated by law capping damages available from vendor of liquor but not from vendor of 3.2 beer).

783, 789-90 (Colo. 1992), *cert. denied*, 113 S. Ct. 483 (1992); *Bloomer v. Board of County Comm'rs*, 799 P.2d 942, 947-48 (Colo. 1990); *Cauley v. City of Jacksonville*, 403 So.2d 379, 387 (Fla. 1981); *Bowen v. City of Columbus*, 256 Ga. 462, 349 S.E.2d 740, 741-42 (1986). Because classifications between different types of governmental entities are usually arbitrary, however, the courts that uphold them can rarely explain why they are doing so. For example:

> We are of the opinion that plaintiffs' assertion is without merit. Persons who seek recovery for negligence against a private tort-feasor and persons who seek recovery under the 'Tort Defense Fund' are *different classes of persons* from those who seek recovery for negligence against the state or its political subdivisions. They are not similarly situated and they may be treated differently. *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971); *Krause v. State of Ohio*, 31 Ohio St.2d 132, 285 N.E.2d 736 (Ohio 1972).
>
> The judgment is affirmed.

O'Dell v. School Dist. of Independence, 521 S.W.2d 403, 409 (Mo. 1975)(emphasis added). That is not constitutional argument. It is the announcement of a result, with next to nothing by way of legal reasoning.

Three federal appellate courts have addressed the issue. Two rejected the constitutional claims out of hand. *See Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 444 (5th Cir. 1991); *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 52 (3d Cir. 1984). The third, while upholding a distinction between city streets and county roads, did articulate a genuine difference between crowded

urban avenues and their rural counterparts "which sprawl all over the countryside." *Aubertin v. Board of City Comm'rs*, 588 F.2d 781, 785 (10th Cir. 1978).

2. The issue is properly presented.

First, the issue has been scrupulously preserved. Neither Respondent nor the courts below have suggested waiver of the issue. Moreover, it was squarely decided by the state supreme court. App. at 6a. *See Cohen v. Cowles Media Co.* 111 S. Ct. 2513, 2517 (1991)("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.").

Second, the sharpness of the conflict is real. When a state court strikes down this sort of law, it often invokes state and federal equal protection grounds. *E.g., Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978)(immunity given only to one city); *Ryszkiewicz v. City of New Britain*, 193 Conn. 589, 479 A.2d 793 (1984)(same); *see also Bernthal v. City of St. Paul*, 376 N.W.2d 422 (Minn. 1984)(striking down immunity that turned on status under worker's compensation law); *Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988)(striking down immunity that was restricted to ski slope operators). These double-barreled holdings count in the assessment of a conflict.[2]

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[2] Such dual holdings once impeded review, because of the "adequate and independent state ground" principle. *See Sidle v. Majors*, 429 U.S. 945, 949-50 (1976)(Brennan and Marshall, JJ., dissenting from denial of cert.)(on the problems of certiorari review of auto guest statutes: "an inevitable, and I think heretofore unappreciated, bias in favor of upholding those statutes"). Today a dual holding of invalidity is presumptively reviewable. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Finally, this case is a fitting vehicle for addressing the federal question, because that question is effectively unreachable in several states. This occurs where state constitutional guarantees have greater force than their federal counterparts. There, an immunity scheme will fail for state law reasons (usually under a heightened type of scrutiny), and it becomes impossible for the federal issue to reach this Court. *E.g.*, *Dover v. Imperial Cas. & Indem. Co.*, 133 N.H. 109, 575 A.2d 1280, 1286 (1990)(state equal protection denial); *cf. id.* at 1287 (SOUTER, J., dissenting).

B. The Issue is Important

This issue is important for a number of reasons, primarily because of trends within state and local governments.

1. The Constitution should have the same meaning in each state.

The idea that the Constitution should vary by locality has long been thought intolerable. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)("If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable . . . .").

2. National trends confirm the recurring nature of the problem.

a. The trend favors limited abolition of governmental immunity.

Partial abrogation is a nationwide phenomenon. With lines being drawn all over the place, the result is not just a proliferation of classifications generally, but of arbitrary classifications in particular -- many of which defy rational explanation. Rational explanation is what the Equal Protection Clause demands.

At one extreme, government may retain full immunity; or it may abolish immunity altogether. What it may not do is draw irrational lines between the two extremes. For example, it would be improper to waive immunity only as to a left-handed claimant, but not a right-hander. Nor would it be lawful to immunize only cities with names starting with a vowel. The infirmity is in the irrationality. To quote the Connecticut Supreme Court:

> It is of no benefit to the defendant that at one time all municipalities were exempt from liability in cases such as this. Courts throughout the nation have consistently held that once the legislative body abolishes sovereign or governmental immunity, it must do so in a way that comports with federal and state constitutional guarantees of equal protection. See *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978); *Harvey v. Clyde Park District*, 32 Ill.2d 60, 67, 203 N.E.2d 573 (1965); *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975), rev'd in part on rehearing, 219 Kan 2, 547 P.2d 1015, appeals dismissed for want of jurisdiction sub nom. *Bruce v. Wichita State University*, 429 U.S. 806, 97 S. Ct. 41, 50 L.Ed.2d 67 (1976); *Estate of Cargill v. Rochester*, 119 N.H. 661, 406 A.2d 704 (1979); *Patch v. Sebelius*, 320 N.W.2d 511 (N.D. 1982); *Jenkins v.*

> *State*, 85 Wash.2d 883, 540 P.2d 1363 (1975); *Sambs v. Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980); *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979).

Ryszkiewicz, 479 A.2d at 798; *see also Jenkins v. State of Washington*, 85 Wash.2d 883, 540 P.2d 1363-69 (1975) ("Once sovereign immunity has been waived, even partially, any legislative classifications made with reference thereto will be constitutional only if they conform to the equal protection guarantees of the state and federal constitutions").

The Texas Supreme Court could not come up with a rational basis for the distinction here. Nor could Respondent. None exists. Indeed, the Court admitted as much:

> It cannot be denied that applying immunity based upon the creation of the governmental unit instead of its function results in certain anomalies and inconsistencies. As Guillory points out, the Port of Galveston, owned and operated by the City of Galveston, is not as fully shielded by immunity as is the Port of Houston, a water navigation district, even though the two entities perform similar functions. However, one governmental unit cannot be denied the immunity to which it would otherwise be entitled simply because the Legislature has waived immunity for another governmental unit. One may disagree with the choices made by the Legislature, but one can hardly deny its power to choose.

App. at 7a (footnote omitted). That is it. That is the whole explanation. To assert a "power to choose" is no answer to a charge of having chosen irrationally. The fact that the rational basis test is so deferential makes this silence surpris-

ing, given the modest justification which would suffice -- if any existed.

b. The trend favors greater government participation in the market.

A concurrent trend is the growth of government involvement in commercial activities. Only in 1976 did this Court begin to confront the effects of states as players in the market. *See South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 93 (1984)("The precise contours of the market-participant doctrine have yet to be established, however, the doctrine having been applied in only three cases of this Court to date."). New York's World Trade Center, which is owned by a Port Authority, comes to mind. This problem will not go away; it will get worse. As state authorities deepen their participation in business, the immunities they carry along will ensure difficulties. If the line between proprietary and governmental functions was formerly hazy, it will become even more so in the future, as state enterprises grow and legislatures periodically move the boundary stones that had separated the immune from the non-immune.[3]

c. The trend favors "tort reform" legislation.

Yet another trend is to use damage caps and other limiting devices that apply selectively to some classes of claims and parties, but not to others. This reaches beyond the area of governmental immunity and includes such acts as medical malpractice laws and dram shop statutes. Such line-

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[3] For example, a 1987 attempt to codify some acts as governmental included several dozen functions, although not the act of leasing motor vehicles for profit as in this case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (Vernon Supp. 1993); App. at 29a.

drawing enterprises are sure to multiply, as Justice WHITE has prophesied. *Fein v. Permanente Med. Group*, 474 U.S. 892, 895 (1985)(WHITE, J., dissenting from denial of review)("The issue is important, and is deserving of this Court's review. Moreover, given the continued concern over the 'malpractice crisis,' it is likely that more States will enact similar types of limitations, and that the issue will recur."). The details of a given scheme -- whether it bars liability, limits damages, or erects procedural obstacles -- are of little constitutional significance. Those are matters of degree. What counts is the classification's *validity*.

3. The issue has percolated long enough.

This issue is ripe for review. It has generated decisions from most state supreme courts and several federal courts of appeals. Further delay in settling the conflict would serve no purpose, except to perpetuate the coexistence of two incompatible readings of the Equal Protection Clause. Which is right may be a thorny question. But one of them must be wrong. Until an answer is forthcoming from this Court, millions of citizens will continue to live under an unlawful regime -- either because immunity is being illegally granted on irrational grounds (as in some states), or because an overzealous application of the Equal Protection Clause is being used to frustrate the will of democratically elected legislatures (as in other states).

* * *

This level of disorder in the application of the Equal Protection Clause warrants a grant of review. The specific issue here arises regularly, and the fact that the lower courts continue to reach contradictory results cannot be denied. Nor can the conflict be downplayed by searching for trivial distinctions among the cases, e.g. that

BEST AVA

* the holdings of *unconstitutionality* had to do with distinctions between hospitals (Alabama), between cities (Connecticut), between airports (Alabama), or between highways (Kansas), whereas

* the holdings of *constitutionality* had to do with distinctions between ports (Texas), between water supply districts (5th Circuit), between health care facilities (3d Circuit), or between roads (10th Circuit).

If one tinkers long enough with the level of abstraction used in framing an issue, it is usually possible to come up with an artificial distinction. Petitioner has fairly presented a true conflict.

It has been said that the rational basis test "'is not a toothless one.'" *Matthews v. de Castro*, 429 U.S. 181, 185 (1976)(quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)). Perhaps not. But that presumes the existence of only one such test. What has in fact come about is that courts are using two different versions of the rational basis test. One has bite. The other, if not toothless, is at least orthodontically challenged.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

John O. GUILLORY, Petitioner,

v.

PORT OF HOUSTON AUTHORITY,
Respondent.

No. D-1391.

Supreme Court of Texas.
Jan 20, 1993.
Rehearing Overruled March 3, 1993.

OPINION

HECHT, Justice.

The principal issue in this case is whether the Texas Tort Claims Act, TEX. CIV. PRAC. & REM CODE §§ 101.001 -.109, limits the liability of political subdivisions created by the Legislature under article XVI, section 59 of the Texas Constitution, for common law and federal maritime law tort claims. We hold that it does, and affirm the judgment of the court of appeals.

John O. Guillory, a longshoreman, was unloading cargo for Dixie Stevedores, Inc. when the truck he was driving flipped backwards off of a ramp and into a ship's hold. The truck was leased from the Port of Houston Authority, which owned it. The Port Authority is a navigation district created by the Legislature under article

XVI, section 59 of the Texas Constitution.[1]
Act of June 14, 1927, 40th Leg., 1st C.S., ch. 97, 1927 Tex. Gen. Laws 256, 2257 (creation and organization of Harris County Houston Ship Channel Navigation District), *amended by* Act of April 29, 1957, 55th Leg., R.S. ch. 117, 1957 Tex. Gen. Laws 241, *amended by* Act of March 24, 1971, 62nd Leg., R.S., ch. 42, 1971 Tex. Gen. Laws 79 (name changed to Port of Houston Authority), *amended by* Act of May 25, 1987, 70th Leg., R.S., ch. 1042, 1987 Tex. Gen. Laws 3506, 3508 (organization and powers). *amended*

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1. Article XVI, section 59 provides in pertinent part:

> (a) The conservation and development of all of the natural resources of this State, including ... the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.
>
> (b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

by Act of May 28, 1989, 71st Leg., R.S., ch. 1019, 1989 Tex. Gen. Laws 4115 (organization and powers); *see* TEX. WATER CODE §§ 60.001-.414. Guillory sued both the Port Authority and Dixie Stevedores under state common law and federal maritime law, claiming damages for personal injuries caused by their negligence. A jury found that the truck was defective and attributed the negligence which caused Guillory's accident 95% to the Port Authority and 5% to Dixie. The jury awarded Guillory $284,614.04 actual damages and $500,000.00 exemplary damages. The trial court rendered judgment on the verdict that Guillory recover a total of $956,781.87 from the Port Authority, including $172,167.87 in prejudgment interest.[2]

The court of appeals reformed the judgment to limit the Port Authority's liability to $100,000. 814 S.W.2d 119. The court reasoned that because a navigation district like the

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2. The trial court's judgment also allowed the Port Authority contribution from Dixie Stevedores. The court of appeals reversed this portion of the judgment, following the rule that a liable defendant has no right of contribution from a defendant against whom the injured person has no cause of action. 814 S.W.2d 119, 124. Since Guillory received compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1984), he was precluded from suing Dixie Stevedores, *id.* at § 905(a). Thus, the court held that the Port Authority was not entitled to compensation from Dixie Stevedores. The Port Authority has not appealed this portion of the court of appeals' decision.

Port Authority is a political subdivision of the State which can act only in a governmental capacity and not in a proprietary capacity, *Bennett v. Brown County Water Dist.*, 153 Tex. 599, 272 S.W.2d 498, 502 (1954), it is protected by governmental immunity except to the extent immunity has been waived by the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §§ 101.001(2)(B), 101.025, 101.051. The Act limits the liability of a governmental unit like the Port Authority to $100,000 per person. TEX. CIV. PRAC. & REM. CODE § 101.023(b). The court concluded that this limitation was not precluded by federal maritime law.

Since the Tort Claims Act was passed in 1969, we have repeatedly held that "the waiver of governmental immunity is a matter addressed to the Legislature." *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976); *accord, State Dept. of Highways & Public Transp. v. Dopyera*, 834 S.W.2d 50, 54 (Tex. 1992) ("Texas is immune from tort liability except as waived under the Tort Claims Act"); *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) ("The school district, a governmental unit, is immune from liability ... unless that immunity has been waived by the Texas Tort Claims Act"); *Mount Pleasant Indep. Sch. Dist. v. Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989) ("Only when the legislature has clearly and explicitly waived the state's sovereign immunity may a cause of action accrue"); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). Any waiver exposes governmental units to increased liability, the burden of which must eventually be born by the general populace. In the Tort Claims Act, the Legislature has undertaken to address the difficult conflicting policies associated with a waiver of governmental immunity. We consider the Legislature better suited than this Court to try to accommodate these policies, and therefore we continue to refuse to disturb the balance it has struck.

Guillory does not expressly urge that governmental immunity be abrogated altogether, although he does point out that courts in other jurisdictions have done so. Rather, Guillory asks that we limit the protection of immunity to governmental activities as opposed to proprietary activities. Guillory points out that municipalities are not immune from liability for their proprietary actions, TEX. CIV. PRAC. & REM. CODE § 101.0215, and argues that other units of government should not be treated differently. To allow one governmental agency immunity for its proprietary actions and deny immunity to another agency for the same conduct, Guillory argues, is irrational and violates state and federal constitutional guarantees of equal protection to victims of the conduct. If an activity could be conducted by a private entity, Guillory contends, a governmental entity should not be immune from liability for conducting the same activity. In this case the Port Authority leased trucks for profit, an activity Guillory contends is clearly proprietary. Guillory urges that the Port Authority should be responsible for the damages caused by its negligence in failing to equip the trucks with seat belts and adequate brakes.

We reject Guillory's arguments for a number of reasons. First, the limitation on immunity which Guillory seeks has the same effect as a waiver. If we accepted Guillory's definition of proprietary activities to include anything a private entity could do, the waiver would be expansive. Private entities *can* provide police and fire protection, operate prisons, and adjudicate disputes, activities which are also governmental; there are few activities indeed which are uniquely governmental. To waive immunity for all others would virtually vitiate immunity entirely. Even if the proposed waiver were narrower, however, it remains a matter for the Legislature, as we have consistently held.

This is especially so when the waiver for which Guillory argues is to be effected by excluding proprietary

activities from the protection of immunity. The Legislature has assumed this very undertaking for municipalities, classifying proprietary and governmental activities and waiving immunity for the former. TEX. CIV. PRAC. & REM. CODE § 101.0215. In so doing, the Legislature has acted upon the authority of article XI, section 13 of the Texas Constitution, adopted in 1987.[3] This provision is a further indication of the will of the people that the waiver of immunity be left to the Legislature.

To accept Guillory's argument would require that we overrule *Bennett v. Brown*, 153 Tex. 599, 272 S.W.2d 498 (1954), and disapprove *Lynch v. Port of Houston Authority*, 671 S.W.2d 954 (Tex. App. -- Houston [14th Dist.] 1984, writ ref'd n.r.e.), and *Smith v. Harris County Ship Channel Navig. Dist.*, 330 S.W.2d 672 (Tex. Civ. App. -- Fort Worth 1959, no writ). In *Bennett* we held that governmental units created under article XVI, section 59 of the Texas Constitution are entirely governmental in function. Water improvement districts and other agencies created under this constitutional provision are different from municipalities in that the former are created by the Legislature for general public purposes, while the latter are created by consent of their inhabitants. This distinction provides a rational basis both in support of *Bennett* and in contradiction of Guillory's equal protection complaint. Inasmuch as the distinction remains valid, we decline to overrule *Bennett*.

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3. "(a) Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statutes or common law.

(b) This section applies to laws enacted by the 70th Legislature, Regular Session, 1987 and to all subsequent regular or special sessions of the Legislature."

It cannot be denied that applying immunity based upon the creation of the governmental unit instead of its function results in certain anomalies and inconsistencies. As Guillory points out, the Port of Galveston, owned and operated by the City of Galveston, is not as fully shielded by immunity as is the Port of Houston, a water navigation district, even though the two entities perform similar functions. However, one governmental unit cannot be denied the immunity to which it would otherwise be entitled simply because the Legislature has waived immunity for another governmental unit. One may disagree with the choices made by the Legislature, but one can hardly deny its power to choose.[4]

Guillory's argument that federal maritime law precludes the Port Authority's claim of immunity is answered by our recent opinion in *State Dept. of Highways & Public Transp. v. Dopyera*, 834 S.W.2d 50, 51 (Tex. 1992), where we stated: "Congress did not intend for maritime law to preempt a state's sovereign immunity law in this manner." Guillory contends that *Dopyera* is wrongly decided, and further, that it should be distinguished from the present case because it involved only property damage and not personal

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4. The cases from other jurisdictions cited by the dissent do not support its argument. In *Flax v. Kansas Turnpike Auth.*, 226 Kan. 1, 596 P.2d 446 (1979), the court struck down a statute which immunized a turnpike authority from liability for accidents on its roadway when no other governmental unit -- state, counties or municipalities--enjoyed such immunity. Likewise, in *Harvey v. Clyde Park Dist.*, 32 Ill.2d 60, 203 N.E.2d 573 (1964), the court struck down a statute immunizing a park district from liability when no city had such immunity and the state and other governmental units had only limited immunity. In the present case the Port Authority's limited immunity is the same as that of a state, every county, and other arms of state government.

injuries. Although the distinction between the two cases exists, it does not justify a different view of maritime law preemption in this case. We decline to overrule *Dopyera*.

Finally, Guillory argues that the federal courts would not hold the Port Authority immune from suit under the Eleventh Amendment to the United States Constitution, but would allow an action like Guillory's even though it would be barred by immunity in state court. Guillory places principal reliance upon *Jacintoport Corp. v. Greater Baton Rouge Port Comm.*, 762 F.2d 435 (5th Cir.), *cert. denied*, 474 I/S/ 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986). However, in *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901 (5th Cir. 1987), the Fifth Circuit reasserted its conclusion in *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983), that the Port of Houston Authority is immune from suit under the Eleventh Amendment, notwithstanding the different view taken of the Greater Baton Rouge Port Commission in *Jacintoport*.

Finding no error in the court of appeals' decision, we affirm the judgment of that court.

GAMMAGE J., joins in the judgment only.

Dissenting opinion by DOGGETT, J., joined by SPECTOR, J.

PHILLIPS, C.J., not sitting.

DOGGETT, Justice, dissenting.

The adage "any port in a storm" did not hold true for John Guillory. Had his accident occurred at the Port of Galveston or the Port of Orange, he would be entitled to his actual damages as determined by a jury. Because, however,

his employer rented a truck with defective brakes and no seatbelts from the Port of Houston, this court limits his recovery to only a fraction of what a jury determined to be reasonable. Because today's ruling denies a worker the equal protection of our laws guaranteed by the Texas Constitution, I dissent.

I.

John Guillory was unloading cargo at the Port of Houston Authority when the leased truck he was attempting to drive from the hull of a ship stalled halfway up a ramp, reared into the air, and tossed him around inside of the cab. As a result Guillory underwent two surgeries and remains permanently disabled. At least thirty other workers also suffered severe injuries from deficiencies in trucks leased by the Authority. At times the only available means to stop the loaded vehicles, which had no seat belts and frequently no functioning brakes, was to ram them into the sides of ships, but even this unsatisfactory option was unavailable to Guillory, going uphill without sufficient power to exit the ship's hold. Although admitting its awareness of this problem, the Port continued to lease defective trucks.

II.

When it applies, the Texas Tort Claims Act limits the liability of local governmental units for a single occurrence of bodily injury to $100,000 per person. TEX. CIV. PRAC. & REM. CODE § 101.023(b). While the Act generally covers torts committed by local governmental units as well as the State, the Legislature did not limit the liability of a municipality arising from it "proprietary functions, which are those functions, that a municipality may, in its discretion, perform in the interest of [its] inhabitants." *Id.* §

101.0215(b)[1] Since leasing motor vehicles is not required of municipalities by law, a city would be fully liable for any injuries it tortiously caused through such an operation.

Unfortunately for Guillory and others severely injured through its negligence, the Port of Houston is not a municipality. In passing the Tort Claims Act the Legislature limited the liability of other units of government, such as navigation districts, for misconduct arising from their proprietary activities. However, since port authorities that are owned and operated by municipalities are not subject to any damages limitation, anyone incurring more than $100,000 damages as a result of tortious proprietary activity by the Ports of Galveston or Orange is legally entitled to full compensation, but those suffering identical injuries under

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1. Thus, a municipality's liability is not statutorily limited for torts arising from operation of a public utility, *id.* §101.0215(b)(1); operation of municipally owned amusements, *id.* § 101.0215(b)(2); administration of a federal development loan program, *Houston v. Southwest Concrete Constr., Inc.*, 835 S.W.2d 728, 732 (Tex. App. -- Houston [14th Dist.] 1992, writ denied_; and any other activity fitting the statutory definition that is not also listed as a governmental activity in § 101.0215(a).

At the time of Guillory's accident, the Tort Claims Act expressly excluded torts arising from the proprietary functions of municipalities but neither defined the term nor included a list of proprietary or governmental activities. *See* Acts 1969, 61st Leg., ch. 292, § 18(a), 1969 Tex. Gen. Laws 874, *amended by* Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.02, 1987 Tex. Gen. Laws 48. At common law, Guillory's injuries would have been considered to have arisen from a "proprietary function" because they were caused by a defective motor vehicle. *See City of Houston v. Shilling*, 150 Tex. 387, 240 S.W.2d 1010, 1012 (1951). While the current version of the Tort Claims Act provides that maintenance of motor vehicles and equipment is a governmental activity, *see* Tex. Civ. Prac. & Rem. Code § 101.0215(a)(24), the statute does not specifically address whether leasing motor vehicles for profit should be considered a proprietary function.

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identical circumstances at the hands of a navigation district of legislative origin such as the Port of Houston are not.

Article I, Section 3 of the Texas Constitution states that "All free men ... have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges." This provision expresses the will of the people that the Legislature may not create legal categories which result in different treatment of similarly situated individuals or groups. This constitutional command for equal protection of our citizens prohibits enactments that bear "no reasonable relationship between the classes created and the purposes to be accomplished or the evils to be prevented."[2] *San Antonio Retail Grocers, Inc. v. Lafferty*, 156 Tex. 574, 297 S.W.2d 813, 816 (1957); *see also Brown v. State on Behalf of Jarvis*, 808 S.W.2d 628, 632 (Tex. App. -- Austin 1991, writ denied)("the equal protection clause ... requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike"). The majority does not and cannot explain what purpose of the Tort Claims Act is potentially served by differentiating between the proprietary functions of municipalities and those of navigation district, or how that distinction rationally relates to this undisclosed purpose.

While admitting that its result is "anomal[ous] and inconsisten[t]," at 814, the majority nonetheless determines it is also "rational" because the Port of Houston is a direct creation of the Legislature, while the Port of Galveston,

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2. While certain statutes may require more intense scrutiny and heightened justification, it is not necessary to determine the applicable standard of review here, since this legislative classification lacks even a rational basis.

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though operated by a legislatively empowered municipal corporation, is not. The difference in origin of the Port of Houston from municipal ports is entirely unrelated to the purposes of the Tort Claims Act, which was designed to lessen some of the harsh effects of absolute governmental immunity without authorizing unrestricted liability for every type of mistake. *See generally* Joe Greenhill and Thomas Murton, *Governmental Immunity*, 49 Tex. L. Rev. 463 (1971) (discussing the legislative history of the Act). Distinguishing between municipalities and other local governmental entities without regard to their functions does not advance that objective. Such a classification protects neither the coffers of the state treasury nor policymaking authority of state government. The Port of Houston is an independent body with its own tax base and receives no state funds. Its primary business is to provide cargo and docking services to shipowners for profit, and it is "almost entirely free of state administrative agency and control." G. Sidney Buchanan, Texas Navigation Districts and Regional Planning in the Texas Gulf Coast Area, 10 Hous. L. Rev. 533, 578 (1973).

Simply because the Legislature created the Port of Houston is no reason it should be entitled to greater immunity than municipally owned ports. As a Michigan court articulated in holding that counties should not have greater immunity than municipalities:

> Rightfully, we inquire again what distinguishes a constitutional "body corporate" from a "municipal corporation." In candor, we must say the distinction, if any, is one without a difference.

Myers v. Genesee County Auditor, 375 Mich. 1, 133 N. W.2d 190, 193 (1965). Nor is this distinction made rational

because it was part of the common law or because the Constitution declared that navigation districts are "bodies politic." TEX. CONST. art. XVI, § 59(b). "[W]hen the Constitution and the Legislature declare that a water improvement district shall be a 'body politic and corporate' it does not classify it either as more nearly like a county or city because both are bodies politic, and both are corporate." *Bennett v. Brown County Water Improvement Dist. No. 1*, 153 Tex. 599, 272 S.W.2d 498, 507 (1954) (Wilson, J., dissenting).[3] While there may be some circumstances affording a rational basis for granting greater immunity to some governmental units than others, none is present here.

Courts in our sister states have also struck down immunity classifications between functionally similar levels of government. In *Flax v. Kansas Turnpike Auth.*, 226 Kan. 1, 596 P.2d 446 (1979), the court held that a statute granting immunity to local units of government violated equal protection as applied to a legislatively created turnpike authority. The court found that there was no rational basis for treating motorists injured on one type of roadway differently from those hurt on others controlled by different governmental units. 596 P.2d at 451-52. Similarly, a statute creating a shorter limitations period for suits brought against counties was found unconstitutional as lacking any "rational permissible reason" for distinguishing between victims of misconduct on the basis of the type of governmental entity causing it. *Jenkins v. State*, 85 Wash. 2d 883, 540 P.2d

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3. Although I am inclined to agree with Guillory that *Bennett* was poorly decided, it need not be overruled. The equal protection problem at issue here is the *Legislature's* decision to treat municipalities differently from functionally similar governmental entities. Even if *Bennett* had never been issued or had held that navigation districts are not immune when exercising proprietary functions, the damages limitation in the Tort Claims Act would still be unconstitutional as applied here.

1363, 1367 (1975)(en banc); *see also Harvey v. Clyde Park Dist.*, 32 Ill.2d 60, 203 N.E.2d 573, 576 (1964) (statute granting immunity to park districts but not other governmentally operated recreational facilities violates equal protection). Statutes granting one municipality greater immunity than is available to others have also been invalidated on equal protection grounds. *See Peddycoart v. City of Birmingham*, 354 So.2d 808, 810 (Ala. 1978) (statute granting immunity to state's largest city unconstitutional); *Ryszkiewicz v. City of New Britain*, 193 Conn. 589, 479 A.2d 793, 800 (1984) (no "financial, climatic, topographic, demographic, or other circumstances" justifying unique limitation on liability for one city).

Employing rhetorical misdirection to avoid explaining the inexplicable, the majority states that "one governmental unit cannot be denied the immunity to which it would otherwise be entitled simply because the Legislature has waived immunity for another governmental unit." At 815. Such analysis of legislative classifications would read the rational basis requirement entirely out of the law. The majority cannot rightfully avoid its constitutional responsibility to enforce the guarantee of equal protection by deferring to the Legislature all considerations pertaining to the scope of governmental immunity. The Legislature has made an arbitrary choice to provide the Port of Houston protection for its irresponsible activities when similarly situated ports must fully compensate the victims of their misconduct. This discriminatory classification sanctioned by the majority cannot withstand scrutiny under the equal protection provisions of the Texas Constitution,m and it is the duty of this court to police the mandate of the people there embodied.

SPECTOR, J., joins in this dissenting opinion.

The PORT OF HOUSTON AUTHORITY and Dixie Stevedores, Inc., Appellants,

v.

John O. GUILLORY and the Port of Houston Authority, Appellees.

No. 01-90-00935-CV.

Court of Appeals of Texas, Houston (1st Dist.).

June 27, 1991.

Rehearing Overruled July 25, 1991.

Before DUGGAN, PRICE[1] and DUNN, JJ.

OPINION

DUNN, Justice.

The appellant, The Port of Houston Authority ("Port Authority"), appeals the judgment rendered in favor of the appellee, John O. Guillory. The appellant, Dixie Stevedores, Inc. ("Dixie"), appeals the judgment rendered in favor of the appellee, the Port Authority.

Guillory sued the Port Authority for personal injuries he received because of the alleged negligence of the Port

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1. The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

Authority. Guillory claimed that he was injured on June 9, 1984, while working as a longshoreman for Dixie on the Port Authority's property and operating a truck owned and provided by the Port Authority. Guillory brought suit under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM CODE ANN. § 101.003 (Vernon 1986), the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (Supp. 1990)), and federal maritime law.

The jury found the Port Authority was negligent and its negligence proximately caused Guillory's accident. In addition, the jury found Dixie was negligent and its negligence also proximately caused Guillory's accident. The jury found that 95 percent of the negligence was attributable to the Port Authority and five percent was attributable to Dixie. The jury awarded Guillory $86,462.59 for lost earnings, $30,000 for lost earning capacity, $23,151.45 for past medical expenses, $125,000 for past pain and mental anguish, and $20,000 for future pain and mental anguish. Furthermore, the jury found that the Port Authority engaged in willful, wanton, malicious, or grossly negligent conduct and awarded Guillory $500,000 as exemplary damages.

The trial court entered judgment that Guillory recover $956,781.91, including $172,167.87 in prejudgment interest, from the Port Authority. The trial court also entered judgment that the Port Authority had a five-percent right of contribution against Dixie and could recover $22,839.09.

In its first and second points of error, the Port Authority contends that the trial court erred in awarding Guillory damages in excess of $100,000 and in awarding him exemplary damages. Specifically, the Port Authority contends that the Texas Tort Claims Act only waives the Port Authority's sovereign immunity up to $100,000 in damages and does not waive its immunity from exemplary damages.

Not only did Guillory assert his cause of action under the Texas Tort Claims Act, he also asserted it under federal maritime law. Under the "savings to suitors" clause, a Texas state court could adjudicate Guillory's maritime claims against the Port Authority. 28 U.S.C. § 1333(1) (1986); *see Madruga v. Superior Court*, 346 U.S. 556, 560-61, 74 S.Ct. 298, 300-01, 98 L.Ed. 290 (1954) (state can adjudicate maritime causes of action that are *in personam*).

A state is immune from suit brought under general maritime law unless it has consented to such a suit. *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983); *Lyons v. Texas A & M Univ.*, 545 S.W.2d 56, 58 (Tex. Civ. App. -- Houston [14th Dist.] 1976, writ ref'd n.r.e.). The Port Authority, as a navigation district, is a political subdivision of the state of Texas. *Bennett v. Brown County Water Improvement Dist.*, 153 Tex. 599, 605, 272 S.W.2d 498, 502 (Tex. 1954); *Lynch v. Port of Houston Auth.*, 671 S.W.2d 954, 959 (Tex. App.-- Houston [14th Dist.] 1984, writ ref'd n.r.e.); TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2)(B) (Vernon Supp. 1991).

Consequently, the Port Authority is immune from suit under maritime law unless consent has been given. *Kamani*, 702 F.2d at 613.

Guillory argues that the Port Authority is not entitled to sovereign immunity because the present suit arises out of a proprietary function. However, the Port Authority, like a county, only performs governmental functions.; it does not perform proprietary functions. *Bennett*, 153 Tex. at 605, 272 S.W.2d at 502; *Lynch*, 671 S.W.2d at 959; *Jones v. Texas Gulf Sulphur Co.*, 397 S.W.2d 304, 308 (Tex. Civ. App. - Houston 1965, writ ref'd n.r.e.)

Guillory urges this Court to consider the dissent in

Bennett and find that the Port Authority was engaged in a proprietary function. The dissent argued that navigation districts should not enjoy sovereign immunity when engaged in a purely local function. *Bennett*, 153 Tex. at 623-24, 272 S.W.2d at 513-14 (Wilson, J., dissenting). In addition, Guillory urges this Court to consider several federal cases, which considered immunity under U.S. CONST. amend. XI, that have analyzed whether a port or navigation district was performing a proprietary function. *See, e.g., McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 906 (5th Cir. 1987) (after viewing powers and characteristics of levee board, court concluded it was not arm of the state entitled to immunity); *Jacintoport v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 438 (5th Cir. 1985) (federal court must examine particular entity to determine whether suit against it was really suit against state), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986); *cf. City of Orange v. Lacoste, Inc.*, 210 F.2d 939, 940-41 (5th Cir. 1954) (city operating port was performing proprietary function).

As an intermediate court of appeals this Court is bound to follow the Texas Supreme Court's expressions of the law. *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex. App. -- Houston [1st Dist.] 1988, writ denied); *Witty v. American Gen. Capital Distribs., Inc.* 697 S.W.2d 636, 639 (Tex. App. -- Houston [1st Dist.] 1985), *rev'd in part and aff'd in part*, 727 S.W.2d 503 (Tex. 1987). Changes in the law should be left to the Texas Supreme Court. *Witty*, 697 S.W.2d at 639. Therefore, we continue to follow the law, as stated by the Texas Supreme Court, that a navigation district cannot perform proprietary functions; it can only perform governmental functions.

The state of Texas waived sovereign immunity to suit against it or its political subdivisions in limited circumstances. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1986). Under the Texas Tort Claims Act, a political subdivision of the state is liable for personal injuries caused by the negligence of an employee acting in the scope of his employment if the personal injury arose from "the operation or use of a motor-driven vehicle or motor-driven equipment." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (Vernon 1986); *cf Mifsud v. Palisades Geophysical Inst., Inc.*, 484 F.Supp. 159, 162 (S.D.Tex. 1980) (state of Texas has consented, under Texas Tort Claims Act, to be sued for negligence in a maritime cause of action). Therefore, the Port Authority was not immune from Guillory's maritime cause of action; Guillory claimed he was injured, while driving a truck, due to the Port Authority's negligence.

However, the Texas Tort Claims Act also places limitations of the liability of a political subdivision. A political subdivision's liability is limited to $100,000 in money damages. TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(b) (Vernon Supp. 1991). The limitation on money damages also applies to prejudgment interest. *See Weller v. State*, 682 S.W.2d 234,284, (Tex. 1984) (since jury found damages in excess of $100,000, the Texas Tort Claims Act precludes the award of prejudgment interest); *State Dep't of Highways & Pub. Transp. v. Bacon*, 754 S.W.2d 279, 282 (Tex. App. -- Texarkana 1988, writ denied) (statutory cap on damages in Texas Tort Claims Act precludes recovery of prejudgment interest when total damages equal or exceed the maximum recovery). In addition, the Texas Tort Claims Act does not authorize recovery of exemplary damages from a political subdivision. TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 1986). The primary question presented by this appeal is whether the limitation of liability

and the exclusion of exemplary damages in the Texas Tort Claims Act can be applied to an admiralty cause of action.

In a recent case, the El Paso Court of Appeals considered whether the absolute bar of Texas comparative negligence could be applied to an admiralty cause of action. *State Dep't of Highways & Pub. Transp. v. Dopyera*, 799 S.W.2d 469, 470 (Tex. App. -- El Paso 1990, writ granted). The Dopyeras sought recovery for damages to their yacht incurred when a drawbridge was lowered as the yacht passed under it. *Id.* The jury apportioned 60 percent of the liability to the Dopyeras; under Texas comparative negligence law, the Dopyeras would have been completely barred from recovering any damages. *Id.* The court found that once the state, under the Texas Tort Claims Act, waived its immunity to an admiralty case, maritime laws and remedies applied to the case. *Id.* at 471. Since state law could not be used if it conflicted with maritime law, and the Texas Tort Claims Act contained no provision regarding comparative negligence, the absolute bar of Texas comparative negligence did not prevent the Dopyeras from recovering damages. *Id.* Maritime comparative negligence law governed. *Id.*

The Fifth Circuit considered whether the notice requirement of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (Vernon 1986), applied to an admiralty claim. *Kamani*, 702 F.2d at 615. The court found that the notice requirement, which was contained in the Texas Tort Claims Act, was intended to apply to all claims, including admiralty claims, brought under the Texas Tort Claims Act. *Id.* The notice requirement was a limit on the waiver of sovereign immunity. *Id.* Thus, it was binding on the admiralty claim. *Id.*

Similarly, we find that the limitation on recoverable money damages and the exclusion of exemplary damages are limits on the waiver of sovereign immunity under the Texas Tort Claims Act. *Trinity River Auth. v. Williams*, 689 S.W.2d 883, 884 (Tex. 1985). Unlike the law of comparative negligence, the limitations on money damages and the exclusion of exemplary damages are contained in the Texas Tort Claims Act. Hence, the limitation on money damages and the exclusion of exemplary damages were intended to apply to all causes of action brought under the Texas Tort Claims Act, including admiralty causes of action.

The limitation on money damages and the exclusion of exemplary damages in the Texas Tort Claims Act applied to Guillory's claim under maritime law.

The trial court erred in awarding Guillory more than $100,000 in money damages and prejudgment interest. The trial court also erred in awarding Guillory exemplary damages. We sustain the Port Authority's first and second points of error.

Due to the disposition of the Port Authority's first and second points of error, we do not address its other points of error.

In its first point of error, Dixie contends that the trial court erred in entering judgment that awarded the Port Authority a five-percent right of contribution against Dixie.

The Port Authority filed a third-party claim against Dixie. The Port Authority claimed that, in the event it was held liable to Guillory, it was entitled to contribution or indemnity from Dixie because of Dixie's negligence, the implied warranty of workmanlike performance running from Dixie to the Port Authority, and a contract between the Port

Authority and Dixie. According to the Port Authority, the contract required Dixie to indemnify the Port Authority against any claims arising from Dixie's operations at the Port Authority's property.

The Port Authority was not granted indemnification from Dixie; rather, the Port Authority was granted a right of contribution from Dixie. The Port Authority sought contribution from Dixie because of Dixie's negligence. A liable defendant is entitled to a right of contribution against any other party who is liable to the injured party for a percentage of responsibility. TEX. CIV. PRAC. & REM. CODE ANN. § 33.016(b) (Vernon Supp. 1991). The liable defendant is entitled to contribution even though the injured party may seek no relief from the other party. *Id.*

The jury found Dixie was negligent and its negligence proximately caused Guillory's injuries. Therefore, although Guillory did not assert any claim against Dixie, the Port Authority was entitled to a right of contribution against Dixie for Dixie's percentage of responsibility.

However, a liable defendant is not entitled to a right of contribution from any party against whom the injured party has no cause of action. *Amoco Chems. Corp. v. Malone Serv.* 712 S.W.2d 611, 613 (Tex. App.-- Houston [1st Dist.] 1986, no writ); *Safway Scaffold Co. of Houston, Inc. v. Safway Steel Prods.,Inc.*, 570 S.W.2d 225, 228-29 (Tex. Civ. App. -- Houston [1st Dist.] 1978, writ ref'd n.r.e.); *see also Varela v. American Petrofina Co.*, 658 S.W.2d 561, 562-63 (Tex. 1983) (since employee was precluded under workers' compensation statute from any cause of action against employer, third party had no claim for contribution from employer). Dixie contents that Guillory was precluded from any cause of action against it because he received workers' compensation benefits under

the Longshore and Harbor Workers' Compensation Act.

The burden was on Dixie to prove that Guillory was an employee entitled to workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act and that it had provided such benefits to Guillory. *Clark v. Levingston Shipbuilding Co.*, 226 S.W.2d 212,215 (Tex. Civ. App.-- Beaumont 1949, writ ref'd n.r.e.); *see also Brown Servs, Inc. v. Fairbrother*, 776 S.W.2d 772, 775-76 (Tex. App. -- Corpus Christi 1989, writ denied) (contention that employee's only remedies were under the Workers' Compensation Act was an affirmative defense; burden was on employer to establish it); *Guerrero v. Standard Alloys Mfg. Co.*, 598 S.W.2d 656, 657 (Tex. Civ. App. -- Beaumont 1980, writ ref'd n.r.e.) (when employer presented no evidence that it was subscriber under the Workers' Compensation Act or that it carried workers' compensation insurance, trial court erred in failing to grant employee's motion for judgment on negligence claim).

By stipulation, the evidence established Guillory had been paid workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act. An injured worker who received workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act is precluded from pursuing any cause of action, at law or in admiralty, against his employer. 33 U.S.C. § 905(a) (Supp. 1990). Since Dixie was Guillory's employer, and Guillory received workers' compensation benefits, Guillory was precluded from pursuing a cause of action against Dixie. Consequently, the Port Authority was not entitled to a right of contribution against Dixie, and the trial court erred in entering judgment awarding the Port Authority a five-percent right of contribution against Dixie.

We sustain Dixie's first point of error.

Due to the disposition of Dixie's first point of error, we do not address its second point of error.

We reform the judgment to order the Port Authority to pay Guillory $100,000 in actual damages only. We reverse that portion of the judgment awarding the Port Authority a five-percent right of contribution against Dixie and render judgment that the Port Authority take nothing from Dixie. We affirm the remainder of the judgment, as reformed.

March 3, 1993

RE: Case No. D-1391
Style: JOHN O. GUILLORY
v. PORT OF HOUSTON AUTHORITY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Chief Justice Phillips not sitting.

Sincerely

John T. Adams, Clerk

by /s/
Blanca Morin, Deputy

APPENDIX B

§ 101.001 Definitions

In this chapter:

(1) "Employee" means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

(3) "Motor-driven equipment" does not include:

(A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or

(B) medical equipment, such as iron lungs, located in hospitals.

(4) "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

(5) "State government" means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

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(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

(2) "Governmental unit" means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority; and

(C) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

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§ 101.021. Governmental Liability

A government unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

§ 101.023. Limitation on Amount of Liability

(a) Liability of the state government under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily

injury or death and $100,000 for each single occurrence for injury to or destruction of property.

(c) Liability of a municipality under this chapter is limited to money danages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.

§ 101.0215 Liability of a Municipality

(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

(1) police and fire protection and control;
(2) health and sanitation services;
(3) street construction and design;
(4) bridge construction and maintenance and street maintenance;
(5) cemeteries and cemetery care;
(6) garbage and solid waster removal, collection, and disposal;
(7) establishment and maintenance of jails;
(8) hospitals;
(9) sanitary and storm sewers;
(10) airports;
(11) waterworks;
(12) repair garages;
(13) parks and zoos;
(14) museums;
(15) libraries and library maintenance;
(16) civic, convention centers, or coliseums;

(17) community, neighborhood, or senior citizen centers;
(18) operation of emergency ambulance service;
(19) dams and reservoirs;
(20) warning signals;
(21) regulation of traffic;
(22) transportation systems;
(23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;
(24) vehicle and motor driven equipment maintenance;
(25) parking facilities;
(26) tax collection;
(27) firework displays;
(28) building codes and inspection;
(29) zoning, planning, and plat approval;
(30) engineering functions;
(31) maintenance of traffic signals, signs, and hazards;
(32) water and sewer service; and
(33) animal control.

(b) This chapter does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

(1) the operation and maintenance of a public utility;

(2) amusement owned and operated by the municipality; and

(3) any activity that is abnormally dangerous or ultrahazardous.

(c) The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1904

In The

Supreme Court of the United States

October Term, 1992

JOHN O. GUILLORY,

Petitioner,

v.

THE PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment prohibit a State from granting one level of limited immunity from tort liability for the State and state-created entities and another level of limited immunity for local municipalities?

LIST OF PARTIES

The Port of Houston Authority is a political subdivision of the state of Texas and has no subsidiaries.

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No. 92-1904

In The

Supreme Court of the United States

October Term, 1992

JOHN O. GUILLORY,

Petitioner,

v.

THE PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Port of Houston Authority (Port Authority) respectfully requests that this Court deny John O. Guillory's petition for writ of *certiorari*, seeking review of the judgment of the Supreme Court of Texas in this case. The opinion of the Supreme Court of Texas is reported at 845 S.W.2d 812 (Tex. 1993).

STATEMENT OF THE CASE

Petitioner John O. Guillory (Guillory) fails to raise any special or important reasons to warrant granting his petition for a writ of *certiorari*. The arguments made by Guillory involve issues that are well-settled and do not

involve conflicting decisions between the United States courts of appeals or other state courts of last resort. Although Guillory's statement of the case correctly describes a portion of the factual background and the procedural history, it does not in any way support his claim that the Texas Tort Claims Act violates the Equal Protection Clause of the Fourteenth Amendment.

REASONS THE PETITION SHOULD BE DENIED

I. THIS IS AN ORDINARY TORT LIABILITY CASE RAISING NO SPECIAL OR IMPORTANT ISSUES

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "only when there are special and important reasons therefor." This Court recently rejected and equal protection challenge to a state tort claims act provision limiting damages recoverable from the state when it denied the petition for *certiorari* in *Colorado v. De Foor*, 824 P.2d 783 (Colo. 1992), *cert. denied*, 113 S.Ct. 483 (1992). Because the issues raised by Guillory's petition involve well-settled matters of tort law and do not involve conflicting federal or state decisions, the petition should be denied.

A. The Judgment of the Supreme Court of Texas Comports with All Federal Decisions Rejecting Equal Protection Challenges to State Tort Claims Acts

Three federal appellate courts have considered and rejected claims similar to the one made by Guillory. All

three courts determined that a state's decision to distinguish between governmental entities by establishing varying levels of immunity did not violate the Equal Protection Clause of the Fourteenth Amendment. *See, Grimes v. Pearl River Valley Water Supply District,* 930 F.2d 441, 444 (5th Cir. 1991); *Kranson v. Valley Crest Nursing Home,* 755 F.2d 46, 52 (3d Cir. 1984); *Aubertin v. Board of City Commissioners,* 588 F.2d 781, 785 (10th Cir. 1978). In each case, the courts held that the state statute which limited the tort liability of the state governmental entity had "some rational relationship to a legitimate state objective." *Id.*

B. The Judgment of the Supreme Court of Texas Does Not Conflict With Decisions of Other State Courts of Last Resort

Numerous state courts of last resort have likewise held, consistent with the judgment of the Texas Supreme Court, that a state legislature can establish different levels of sovereign immunity for different governmental entities. *See, e.g., Colorado v. De Foor,* 824 P.2d 783, 789-90 (Colo. 1992), *cert. denied,* 113 S.Ct. 483 (1992); *Bloomer v. Boulder County Board of Commissioners,* 799 P.2d 942, 947-48 (Colo. 1990) (upholding sovereign immunity for counties but not cities with regard to dangerous road conditions); *Bowen v. Columbus,* 349 S.E.2d 740, 741-42 (Ga. 1986) (finding that after the city of Columbus was abolished by the legislature and consolidated with the surrounding county, Columbus was deemed to be a county and to have sovereign immunity even though all other municipalities in the state had no such immunity); *Cauley v. City of Jacksonville,* 403 So.2d 379, 387 (Fla. 1981)

(holding Equal Protection Clause not violated by a statute which limits recovery against municipalities but broadens recovery allowed against state entities).

The state court decisions cited by Guillory in support of his petition either do not conflict with the judgment of the Texas Supreme Court or can be distinguished based on the legislative purpose of the statute in question. *Ryszkiewicz v. City of New Britain*, 479 A.2d 793 (Conn. 1984) concerned an attempt by the Connecticut legislature to establish a level of immunity for one particular city different from all other cities in the state. No similar distinction between identically situated governmental entities is involved in this case.

In Texas, the state constitution authorizes the legislature to create navigation districts such as The Port Authority. *See* Tex. Const. Art. XVI, § 59. Neither section 59 nor the legislation creating The Port Authority contains an immunity provision for The Port Authority different from the sovereign immunity enjoyed by all navigation districts created under section 59. Moreover, The Texas Tort Claims Act recognizes the same limited level of sovereign immunity for The Port Authority as for the state, all counties, and *all* navigation districts created by the legislature. *See Guillory*, 845 S.W.2d at 814-15. *See also Bennett v. Brown County Water Improvement District No. 1*, 272 S.W.2d 498 (Tex. 1954); *Trinity River Authority v. Williams*, 689 S.W.2d 883 (Tex. 1985). Thus, this case does not conflict with cases holding that identically situated governmental entities must be treated equally.

For this reason, the Alabama cases cited by Guillory also not conflict with the judgment of the Texas Supreme

Court. In *Gaines v. Huntsville-Madison County Airport Authority*, 581 So.2d 444 (Ala. 1991), the Alabama Supreme Court struck down a statute which provided immunity to airport authorities in certain counties but not in others. Likewise in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), the court upheld an equal protection challenge to a statute granting immunity to one city but not to all cities. The Port Authority, however, has the same limited immunity as that of all similarly situated governmental entities – including the state, all counties, and all navigation districts. *See Guillory*, 845 S.W.2d at 815, n.4.

In *Chandler v. Hospital Authority of Huntsville*, 500 So.2d 1012 (Ala. 1986), the Alabama court refused to uphold a patchwork legislative scheme which authorized municipalities and counties to establish public hospitals under five separate statutes, only one of which prescribed immunity from tort actions. It is hardly surprising that the hospital could offer no rational basis for the distinctions drawn by the legislature. 500 So.2d at 1016. The Port Authority's immunity, however, does not derive from some obscure or confusing legislative act. Furthermore, a rational basis for recognizing different levels of immunity for different levels of government in Texas can be articulated. *See infra* at 9-13.

In his misguided quest to create a false conflict between the opinions of the supreme courts of Alabama and Texas, Guillory fails to point out the Alabama recognizes different levels of immunity for different governmental entities performing identical functions. The same year it decided *Chandler* (holding that a *municipal* hospital has *no* immunity from tort suits), the Alabama Supreme

Court held that a hospital operated by a *state* university enjoys *absolute* immunity from tort liability. *Sarradett v. University of South Alabama*, 484 So.2d 426, 427 (Ala. 1986). There simply is no conflict between the judgment of the Texas Supreme Court and the Alabama Supreme Court, or any other state court of last resort for that matter.

Flax v. Kansas Turnpike Authority, 596 P.2d 446 (Kan. 1979) concerned a law granting full immunity to the Kansas Turnpike Authority for defects in the Kansas Turnpike when no other governmental unit – the state, counties, or municipalities enjoyed such immunity. *Id.* at 453-54. The Texas Tort Claims Act limits the level of immunity for The Port Authority in the same manner as it does for the state, all counties, and other state-created entities. *Guillory*, 845 S.W.2d at 815, n. 4.

Jenkins v. State of Washington, 540 P.2d 1363 (Wash. 1975) did not even address the question of different levels of immunity for the state and municipalities. The issue in that case involved limitations periods for filing suits against various governmental entities. 540 P.2d at 1367. The issue in this case concerns immunity from unlimited monetary damage awards, not a time of suit provision. No conflict exists, and Guillory's petition should be denied.

II. THE TEXAS TORT CLAIMS ACT'S LIMITED IMMUNITY FOR THE STATE AND STATE-CREATED ENTITIES SUCH AS THE PORT AUTHORITY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Rational Basis Test Applies

Guillory indisputably is not a member of a suspect class and does not assert a claim based on a fundamental right. Accordingly, the rational basis test governs Guillory's equal protection claim. *See, e.g., Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 314 (1976). Under this test, the Texas Tort Claims Act's limited immunity provisions may not be overturned unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that this Court can only conclude that the legislature's actions were irrational. *Pennell v. San Jose,* 485 U.S. 1, 14 (1988).

The rational basis test is not difficult to establish. *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 881 (1985). In areas of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect or result in some inequality. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). A classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. *See, e.g., Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462 (1988).

The materiality of the relation between legislative action and the goal sought to be attained need not be scientifically substantiated under the rational basis test. *Matthews v. Lucas*, 427 U.S. 495, 510 (1976). The legislature need not articulate the law's purpose if a legitimate purpose can be hypothesized. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). As long as there is a conceivable rational basis for the official action, it is immaterial that it was not *the* or *a* primary factor in reaching a decision or even that it was not actually relied upon by the decisionmaker. *See, McGinnis v. Royster*, 410 U.S. 263, 274-77 (1973).

The limited immunity provisions of the Texas Tort Claims Act in question are the type of economic regulation that can be characterized as a legislative effort to structure and accommodate "the burdens and benefits of economic life." *See, Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978). The task of formulating these laws is not always easy, for as this Court has recognized: "the problems of government are practical ones and may justify, if they do not require, rough accommodation – illogical it may be and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). This is why the Equal Protection Clause of the Fourteenth Amendment permits states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

B. A Rational Basis Exists for a State to Establish One Level of Limited Immunity for Itself and State-Created Entities and Another Level of Limited Immunity for Municipalities

1. Texas has traditionally distinguished between units of government in recognizing immunity from tort claims

History is certainly relevant to determine what distinctions are consistent with the rights of equal protection. *Cohen v. Hurley*, 366 U.S. 117, 130 (1961). Traditionally, Texas has distinguished between units of government with respect to immunity from tort claims. Until the enactment of the Tort Claims Act, the state and other state-created entities were entirely immune from tort liability. *City of Austin v. Cooksey*, 570 S.W.2d 386, 387 (Tex. 1978). The Port Authority enjoyed the same absolute immunity from tort liability as did the state. *See Jones v. Texas Gulf Sulphur Co.*, 397 S.W.2d 304, 307 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.); *Smith v. Harris County-Houston Ship Channel Navigation District*, 330 S.W.2d 672, 674 (Tex. Civ. App. – Fort Worth 1959, no writ); *Fylipoy v. Gulf Stevedore Corp.*, 257 F.Supp. 166 (S.D. Tex. 1966).

Historically, Texas has recognized a different level of tort immunity for municipalities. Prior to the enactment of the Texas Tort Claims Act, municipalities enjoyed absolute immunity from tort claims when municipalities engaged in governmental functions. *Turvey v. City of Houston*, 602 S.W.2d 517, 519 (Tex. 1980). Municipalities had no immunity when engaged in proprietary functions. *City of Austin v. Daniels*, 335 S.W.2d 753 (Tex. 1960).

The distinction between municipalities and other levels of government is not some arbitrary or fanciful creation of the legislature. Over a century ago, it was recognized that Texas municipalities are created by special charter chiefly for the benefit of their inhabitants while counties and other "quasi corporations" have been created by the legislature without reference to the wish of their inhabitants and thus for essentially public purposes. *City of Galveston v. Posnainsky,* 62 Tex. 118 (1884).

When the Texas legislature limited the immunity of the state and other state-created entities through the enactment of the Texas Tort Claims Act in 1969, it continued to recognize the historical immunity distinction between levels of government. Ever since its enactment, the Texas Tort Claims Act has had a provision excluding from application under the Act the proprietary functions of a municipality. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.058 (Vernon 1986) *repealed by* Act of June 16, 1987, 70th Leg. 1st C.S., ch. 2, 1987 Tex. Gen. Laws 37, 48 (current version Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b) (Vernon Supp. 1992). The state and state-created entities continue to enjoy sovereign immunity except to the extent the Tort Claims Act creates liability. Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a) (Vernon Supp. 1992). In other words, the legislature did not create a distinction between levels of government regarding immunity from tort liability – it preserved the historical difference.

2. The Distinctions Preserved By the Texas Legislature Satisfy the Rational Basis Test

Like most state tort claims acts permitting suits against the sovereign, the Texas Tort Claims Act represents an equitable balance between two state interests which by their nature compete against each other. On the one hand, the legislature has provided a remedy by which persons tortiously injured by the state or a state-created entity can seek compensation, where before they had no cause of action because of sovereign immunity. *Lynch v. Port of Houston Authority*, 671 S.W.2d 954, 959 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.). On the other hand, the legislature has limited the amount of such recoveries to assure that the financial viability of these state-created entities is not put in jeopardy because of this increased exposure. *See, e.g., Tarrant County Hospital District v. Ray*, 712 S.W.2d 271, 273 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.) (Tort Claims Act limitation on damages is not wholly irrelevant to the legislative goal of preserving governmental funds).

The state has an interest in the financial well-being and ultimate survival of The Port Authority and other state-created entities. The legislature created The Port Authority with the following public purpose in mind:

> [The development of deep water navigation . . . and to construct and maintain canals or waterways to permit of navigation or in aid thereof . . . [The Port Authority] is in urgent need for new and additional sources of revenue and means of financing so that the navigation improvement program of [The Port Authority] can be carried forward and continued and that

> *the State at large has a direct interest in such program . . .*

Act of June 14, 1927, 40th Leg. 1st C.S., ch. 97, 1927 Tex. Gen. Laws 256, *amended by* Act of April 29, 1957, 55th Leg., R.S., ch. 117, 1957 Tex. Gen. Laws 241, 253 (emphasis added).

Unlike ports controlled by the municipalities that created them, The Port Authority derives its powers at large from the Texas Constitution and specifically from the statutes governing the discharge of its duties. Op. Tex. Att'y Gen. No. JM-742 (1987). Section 59 of Article XVI of the Texas Constitution specifically empowers the legislature to pass all laws as may be appropriate for the navigation of the state's inland and coastal waters. Obviously, the state has a compelling interest in preventing state-created entities such as The Port Authority from being exposed to unlimited tort liability. As the Texas Supreme Court noted below, "any waiver (of immunity) exposes governmental units to increase liability, the burden of which must eventually be born by the general populace." *Guillory v. Port of Houston Authority,* 845 S.W.2d at 813. Similarly, the Texas Tort Claims Act provision precluding suits against the state and other state-created entities for exemplary damages is rationally related to the legitimate purpose of protecting the state treasury from having to pay punitive damages when only the taxpayers would be punished. *Lynch v. Port of Houston Authority,* 671 S.W.2d at 958.[1]

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[1] The trial court's judgment against The Port Authority included $500,000 in exemplary damages. Pet'r App. at 16a. The Texas Tort Claims Act does not authorize exemplary damages.

In contrast to itself and entities it created, the state of Texas does not have the same interests when a public entity created by a local municipality is involved. The Texas legislature did not have a hand in the creation, financing or management of entities created by a local municipality. Any entity created by a local municipality was done so for the benefit of the local inhabitants, not for a state-declared public purpose. The Texas Supreme Court articulated this distinction as a rational basis for the limited immunity provision of the Texas Tort Claims Act. *Guillory*, 845 S.W.2d at 813-815.

3. The Legitimate Government Interests Supporting the Distinctions in the Texas Tort Claims Act Are Well-Recognized

The courts that have rejected equal protection claims akin to the one made by Guillory have recognized similar governmental interests to those supporting the distinctions contained in the Texas Tort Claims Act regarding immunity for different levels of government. *Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441 (5th Cir. 1991) considered a Mississippi statute immunizing a water district from tort liability. Even though other political subdivisions of Mississippi did not enjoy the same immunity, the court determined that it was rational for the Mississippi legislature to provide sovereign immunity for the water district in order to advance the legislative purpose of the agency and because the agency's source of

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Tex. Civ. Prac. & Rem. Code. Ann. § 101.024 (Vernon Supp. 1992).

revenue was limited and must be used for purposes prescribed by the legislature. *Id.* at 444. *Kranson v. Valley Crest Nursing Home,* 755 F.2d 46 (3rd Cir. 1985) upheld the immunity distinction created for a municipally operated nursing home on the basis that immunity was necessary to encourage the establishment and operation of such homes and avoid the threat of damage suits. *Id.* at 53. Preserving a governmental entity's funds and fulfilling its public purposes are the same type of legitimate interests rationally related to the Texas Tort Claims Act's provisions limiting liability for the state and state-created entities such as The Port Authority. *See supra* at 11-13.

The historical distinction between state-created entities and municipalities in the area of immunity also has been recognized as a legitimate governmental interest to defeat an equal protection claim such as the one lodged by Guillory. *Obenshain v. Halliday,* 504 F. Supp. 946 (E.D. Va. 1980) concerned a Virginia law that provided immunity to counties but not to municipalities when their employees acted in a proprietary nature. The court held the law did not violate equal protection. Like the traditional distinction recognized in Texas, *Obenshain* observed that counties are created by the state and therefore are agencies of the state. Municipalities are created mainly for the interest, advantage and convenience of the locality and its people. *Id.* at 954. The court held this basic distinction was sufficient for equal protection purposes to justify the different levels of immunity for different levels of government. *Id.*

4. Drawing Demarcation Lines for Immunity According to What Function a Public Entity Serves Would Dismantle the Concept of Sovereign Immunity

Guillory mistakenly asserts that the only way for Texas to constitutionally grant varying levels of immunity to state-created entities is by "making immunity turn on the nature of the activity rather than the juridical origin of the entity." Petition for Writ at 3. Essentially, Guillory asks this court to sit as a super-legislature and redefine the rationally based distinctions between levels of government. This Court has consistently refused to usurp the traditional powers of the states in this area. *See, e.g., Martinez v. California,* 444 U.S. 277, 281-83 (1980) (the existence of tort remedies is generally a matter of state law); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam) (Equal Protection Clause does not authorize judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines).

Moreover, Guillory's argument, if accepted, would result in the abolition of *all* sovereign immunity for the many states which apply different levels of immunity for different levels of government. Certainly, eliminating immunity for The Port Authority cannot occur without eliminating immunity for the state itself, as the state performs similar functions to those of municipalities. If immunity depends on the "function" performed, a state could not even draw a distinction between itself and a private entity performing the same function. As a result, states would be faced with unlimited liability for actual

and punitive damages anytime they built a road, constructed a dam or maintained a port facility. *See Guillory*, 845 S.W.2d at 814.

Because governmental units perform a variety of functions, Guillory's absurd "functional basis test" would force state governments to make a Hobson's choice between abolishing all sovereign immunity or immunizing all levels of government.[2] The rational basis test of the Equal Protection Clause does not require that this type of choice be made – it does not even contemplate it. *See, e.g., Heller v. Doe*, No. 92-351, (U.S. June 24, 1993) 1993 WL 218271, at *4 (rational basis review in equal protection analysis is not a license for the courts to judge the wisdom, fairness or logic of legislative choices). Guillory's petition should be denied.

CONCLUSION

The question that petitioner raises is neither special nor important. The judgment of the Texas Supreme Court involves no unsettled question of law and is entirely consistent with the prior rulings of this court and other

[2] Texas would not even be entitled to make the choice of immunizing all levels of government. The state constitution prohibits the legislature from abolishing causes of action that existed at common law. Tex. Const. art I, § 13; *Sax v. Votteler*, 648 S.W.2d 661, 664-65 (Tex. 1983). Because a common law right existed for a tort litigant to file suit for unlimited damages against a municipality engaged in proprietary functions, Guillory's "test" would require Texas to abolish all sovereign immunity.

federal circuit courts and state courts of last resort concerning the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the petition should be denied.

Respectfully submitted,

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